

No. 77-260

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT O. NAEGELE AND ROGER A. PETERSON,
TRUSTEES, ETC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington D.C. 20530.

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Petitioners¹ ask this Court to reconsider *United States v. Foster Lumber Co.*, 429 U.S. 32, which held that a taxpayer may carry a net operating loss deduction to a succeeding taxable year only to the extent it exceeds the taxpayer's total taxable income (*i.e.*, ordinary income and capital gains) in the prior year in which the Section 1201 alternative tax is employed. On the authority of *Foster Lumber Co.*, the court of appeals concluded that Naegele Advertising Companies, Inc., could not carry

¹Petitioners are trustees in voluntary dissolution of Naegele Advertising Companies, Inc., whose tax liabilities were at issue in the courts below.

forward from 1962 to 1963 net operating loss deductions of \$362,571, because that amount was less than its taxable income for 1962 (Pet. App. A-8 to A-9).²

Petitioners do not dispute that *Foster Lumber Co.* squarely controls this case but contend that *Foster Lumber Co.* was wrongly decided. However, the Court fully considered and rejected the arguments advanced by petitioners. There is accordingly no occasion for the Court to reconsider *Foster Lumber Co.*

Petitioners alternatively urge (Pet. 6) that the Court grant certiorari to review the rule of *Weil v. Commissioner*, 23 T.C. 424, affirmed, 229 F. 2d 593 (C.A. 6), that in computing the Section 1201 tax, an individual taxpayer may not offset an ordinary loss against capital gains. But petitioners did not raise this question in their claim for refund or in the courts below. It would therefore be inappropriate for this Court to consider the issue.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

²For 1962, without reference to the losses carried to that year, Naegele had a net ordinary loss of \$146,399 and a net long-term capital gain of \$2,881,913, for net taxable income of \$2,735,514 (Pet. 4).